

FREEDOM COURT REPORTING

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IN THE CIRCUIT COURT OF
JEFFERSON COUNTY, ALABAMA
HEALTHSOUTH CORPORATION 2002
DERIVATIVE LITIGATION

WADE TUCKER, et al.,

Plaintiff

VS. CV 02-5212

RICHARD M. SCRUSHY, et al.,

Defendants

GREENWICH INSURANCE CO.

Plaintiff

VS. CV 03-3522

HEALTHSOUTH CORPORATION, et al.,

Defendants

STEVEN R. NICHOLS, et al.,

Plaintiff

VS. CV 03-2023

HEALTHSOUTH CORPORATION et al.,

Defendants

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<p style="text-align: right;">Page 2</p> <p>1 FEDERAL INSURANCE COMPANY, et al., 2 Plaintiffs 3 VS. CV 03-2420 4 HEALTHSOUTH CORPORATION, et al., 5 Defendants 6 ----- 7 DENNIS FAMILY TRUST 8 Plaintiff 9 VS. CV 98-6592 10 HEALTHSOUTH CORPORATION, et al., 11 Defendants 12 13 14 15 16 17 BEFORE HONORABLE ALLWIN HORN, III 18 BIRMINGHAM, ALABAMA 19 MARCH 6, 2008 20 21 22 23</p>	<p style="text-align: right;">Page 4</p> <p>1 Mr. Jack B. McNamee 2 McNamee & Liddon 3 2126 Morris Avenue 4 Birmingham, Alabama 35203 5 6 Mr. Will A. Smith 7 Maynard Cooper 8 1901 Sixth Avenue North 9 Birmingham, Alabama 35203 10 11 Mr. John Q. Somerville 12 Galloway & Somerville 13 11 Oak Street 14 Birmingham, Alabama 35213 15 16 17 18 19 20 21 22 23</p>
<p style="text-align: right;">Page 3</p> <p>1 A P P E A R A N C E S 2 3 Mr. W. Michael Atchison 4 Starnes & Atchison 5 100 Brookwood Place 6 Birmingham, Alabama 35209 7 8 Mr. Robert J. Giuffra, Jr. 9 Sullivan & Cromwell 10 125 Broad Street 11 New York, New York 10004 12 13 Mr. John W. Haley 14 Hare, Wynn, Newell & Newton 15 2025 Third Avenue North 16 Suite 800 17 Birmingham, Alabama 35203 18 19 Ms. Julia Cooper 20 Bradley Arant 21 One Federal Place 22 1819 Fifth Avenue North 23 Birmingham, Alabama 35203</p>	<p style="text-align: right;">Page 5</p> <p>1 I, Christie L. Williams, 2 Commissioner, State of Alabama at 3 Large, acting as commissioner, 4 certify that on this date the 5 following proceedings were had: 6 7 8 9 THE COURT: We're on the 10 record this afternoon. We will 11 consider UBS's motion to reconsider 12 my February 19, 2008 order which I 13 will call for purposes of this 14 hearing the estoppel order. That's 15 how I'm going to refer to it. I've 16 read all your papers and I realize 17 that the parties are going to argue 18 whether the Court correctly or 19 incorrectly decided the estoppel 20 issue, but in addition to that 21 argument I want the parties to also 22 address this question: Assuming that 23 the estoppel issue was correctly</p>

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<p style="text-align: right;">Page 6</p> <p>1 decided under the February 19 2 estoppel order, why is it not 3 preserved to UBS the right to assert 4 the MCDC loan or alternatively if in 5 fact UBS is not the actual lender, 6 why does that order not preserve to 7 UBS the right to prevail upon the 8 actual lender to intervene in this 9 case and assert the MCDC loan issue. 10 So in addition to what you're going 11 to argue I would like for everybody 12 to address that issue, too. 13 MR. GIUFFRA: Robert 14 Giuffra, G-I-U-F-F-R-A, for UBS 15 Securities which is the only party 16 that's a defendant in this case. 17 Judge, I think this 18 particular motion and issue goes back 19 to first principles of civil 20 procedure and first principles in 21 terms of enforcement of a contract 22 because what we're talking about here 23 is the enforcement of a contract and</p>	<p style="text-align: right;">Page 8</p> <p>1 amendments to the credit agreement 2 and those amendments are as much a 3 part of a contract as the original 4 agreement. And we gave Your Honor in 5 our motion for reconsideration copies 6 of those amendments and those 7 amendments are -- 8 THE COURT: I believe the 9 amendments are Q and R to your 10 original notebook. When I say 11 original notebook I mean the notebook 12 filed January 17, 2008. 13 MR. GIUFFRA: I believe 14 that's correct, Your Honor. One 15 amendment is amendment number one and 16 that amendment -- 17 THE COURT: Dated June 12, 18 2001. 19 MR. GIUFFRA: Correct, Your 20 Honor. And there's a second 21 amendment which is dated March 28, 22 2002. Now, what's important about 23 these amendments are several things.</p>
<p style="text-align: right;">Page 7</p> <p>1 we're also talking about the Court's 2 subject matter jurisdiction and 3 personal jurisdiction, and these are 4 not things that should be treated 5 lightly or that can be waived. Now, 6 our position and the reason we filed 7 the motion for reconsideration was 8 because in the Court's order the 9 Court had looked at the credit 10 agreement which identified UBS AG 11 Stamford Branch as the administrative 12 agent. 13 Now, just by way of 14 background, it's quite common when 15 there's a credit agreement of this 16 sort that administrative agent 17 controls things like enforcement of 18 the credit agreement and at the time 19 when the credit agreement is signed 20 initially which entity is going to be 21 the lender is not determined. That 22 gets determined later down the road. 23 In this case there were two</p>	<p style="text-align: right;">Page 9</p> <p>1 One, if you look at the little 2 numbers down at the bottom, 3 particularly the copy that -- I don't 4 remember what was in the earlier 5 filing we made, but in the filing we 6 made on the motion for 7 reconsideration it says HD282 and all 8 the documents say HD on them. What 9 that means is that these amendments 10 were in the files of HealthSouth. 11 These are not documents that UBS had 12 squirreled away in UBS's files. 13 These were amendments signed by 14 HealthSouth in HealthSouth's files. 15 So that if I enter into a contract 16 with Jack McNamee over here, I keep a 17 copy of it in my files, he keeps a 18 copy of it in his files and if 19 there's a dispute between the two of 20 us presumably we look at the copy of 21 the document that's in our files. 22 THE COURT: And I will ask 23 you to look at the execution copy of</p>

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<p style="text-align: right;">Page 10</p> <p>1 amendment number one dated June 12, 2 2001. Do you have that before you, 3 Robert?</p> <p>4 MR. GIUFFRA: Yes, I do.</p> <p>5 THE COURT: I don't really 6 know what the correct term is for 7 that first paragraph. I will call it 8 the preamble paragraph.</p> <p>9 MR. GIUFFRA: Yes, Your 10 Honor.</p> <p>11 THE COURT: It identifies 12 UBS AG Stamford Branch as 13 administrative agents for the lenders 14 thereunder.</p> <p>15 MR. GIUFFRA: That's 16 correct, Your Honor, but then if you 17 look --</p> <p>18 THE COURT: If you go to 19 the signature page and there is the 20 identification UBS AG Stamford Branch 21 as administrative agent and lender.</p> <p>22 MR. GIUFFRA: That is 23 correct, Your Honor.</p>	<p style="text-align: right;">Page 12</p> <p>1 UBS AG Stamford Branch. On the last 2 page of the second amendment where 3 this is the commitment section of 4 this document and I've walked these 5 documents through with folks in my 6 law firm who do these kinds of 7 agreements all the time and this is 8 exactly the way this type of an 9 agreement would be documented. So 10 for example, on the last page it says 11 commitments and notice address and it 12 says name of lender, UBS AG Stamford 13 Branch, talks about the commitment 14 amount being 20 million dollars. 15 Now, it gets beyond that because if 16 you were to look in the filings made 17 by -- and we cited another one that 18 we found on our reply brief. 19 HealthSouth filed SEC filings where 20 corporate lawyers went and studied 21 these issues and these were documents 22 and of course since the fraud has 23 come out where they had to figure out</p>
<p style="text-align: right;">Page 11</p> <p>1 THE COURT: And I believe 2 that is also true for the March 28, 3 2002 addendum.</p> <p>4 MR. GIUFFRA: Yes, Your 5 Honor, but then attached to the March 6 28, 2002 part of the contract is a 7 lender addendum.</p> <p>8 THE COURT: I understand, 9 but what I'm -- and I'm glad you 10 raised this. Do these two documents 11 then within the four corners of the 12 documents not contain an inherent 13 contradiction?</p> <p>14 MR. GIUFFRA: No, Your 15 Honor.</p> <p>16 THE COURT: Why is that?</p> <p>17 MR. GIUFFRA: The reason 18 why they don't contain a 19 contradiction is because on the 20 signature page of the document it 21 makes it quite clear that the entity 22 that made the loan and is identified 23 as administrative agent and lender is</p>	<p style="text-align: right;">Page 13</p> <p>1 where the different loans would be 2 subordinated in the capital structure 3 and they full well knew who the 4 lender was. And those filings which 5 were made by HealthSouth say UBS AG 6 Stamford Branch is the lender. We've 7 submitted an affidavit to the Court 8 from UBS AG Stamford Branch making 9 clear that the position of UBS AG 10 Stamford Branch is that they are the 11 lender and on the books and records 12 of UBS AG Stamford Branch the money 13 went from UBS AG Stamford Branch down 14 to Med Center Direct.</p> <p>15 One of the issues that gets 16 glossed over here is that if you look 17 at the actual credit agreement it 18 says on its face that the credit 19 agreement was to be treated as duly 20 executed and delivered in New York. 21 That's what it says in the signature 22 page signed by HealthSouth. Now, Med 23 Center Direct is a company whose</p>

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<p style="text-align: right;">Page 14</p> <p>1 principle place of business was in 2 Georgia and the money went to 3 Georgia. The money did not go to 4 Alabama. HealthSouth was the 5 guarantor to a contract that 6 HealthSouth agreed would be governed 7 by New York law. They agreed that 8 the contract would be executed and 9 delivered in New York and where they 10 consented to jurisdiction in New 11 York. Now, you have a breach of 12 contract claim and so if you go 13 back -- 14 THE COURT: Let me try to 15 clear up something in my own mind, 16 Robert. I don't mean to interrupt 17 you, but I need to clear this up. I 18 have not read any first party 19 personal knowledge testimony either 20 by way of a deposition or an 21 affidavit or otherwise that tells me 22 that AG was in fact the lender. I 23 have looked at these documents.</p>	<p style="text-align: right;">Page 16</p> <p>1 MR. GIUFFRA: Based on my 2 understanding. And then they sued 3 somebody called UBS Investment Bank, 4 said exactly the same thing. I 5 appear before courts and regulators 6 all around the country and my word 7 has to stand for something or else 8 I'm not going to be able to do this 9 for very long. That's correct and it 10 was correct when we put the papers 11 in. There was no attempt to trick 12 anyone. So we put in the documents 13 saying those entities that you sued 14 are not legal entities. 15 THE COURT: Let me ask you 16 something about that, Robert. 17 Suppose that -- when did you file the 18 answer, in August of '05? 19 MR. GIUFFRA: I think 20 that -- 21 THE COURT: -- wherein UBS 22 admitted that it made the loan to 23 MCDC? Suppose instead the disclosure</p>
<p style="text-align: right;">Page 15</p> <p>1 MR. GIUFFRA: Well, we also 2 gave you a sworn declaration that was 3 submitted by someone who is an 4 officer of AG in the New York action. 5 THE COURT: His December 17 6 affidavit? 7 MR. GIUFFRA: Correct. 8 THE COURT: But I did not 9 have that at the time that I ruled on 10 this motion. 11 MR. GIUFFRA: And I 12 apologize, Your Honor, that you did 13 not have that, but I think that what 14 you have here when you slice it out 15 is the following: When the 16 derivative plaintiffs brought their 17 case against -- and they filed it 18 initially against something called 19 UBS Group and I put an affidavit in 20 and I said not a legal entity, it's a 21 business group name. 22 THE COURT: Based upon your 23 understanding.</p>	<p style="text-align: right;">Page 17</p> <p>1 had been made that UBS AG Stamford 2 Branch had made the loan. Do you 3 think that the plaintiffs would have 4 amended and brought in AG? 5 MR. GIUFFRA: If you were 6 to look at the complaint that was 7 filed, the original complaint, they 8 don't bring a claim seeking to undo 9 the guarantee under New York law. It 10 doesn't say this guarantee should be 11 declared void, it doesn't say 12 anything about the guarantee. The 13 words guarantee do not appear to use 14 a word within the four corners of the 15 document. There's one discussion of 16 UBS providing funding to Med Center. 17 There's not even a description of the 18 loan. And if someone wants to bring 19 a breach of contract case, normally 20 you would identify the contract, you 21 might attach it to the complaint; 22 they didn't do it. My own view is -- 23 and HealthSouth knew full well that</p>

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<p style="text-align: right;">Page 18</p> <p>1 there was this claim. They thought 2 that UBS could just -- UBS AG 3 Stamford Branch would just sit 4 quietly by and just either write this 5 off or do nothing. So what 6 essentially they want to do is the 7 following: When we brought the case 8 in New York, which we were entitled 9 to do, they consented to New York 10 jurisdiction, they had agreed to New 11 York law, they had agreed not to 12 object on forum non conveniens or any 13 other kind of grounds to New York 14 law, because that was how they got 15 the loan in the first place. There 16 was a filing where they said, oh, 17 there's this error in the answer. 18 What I did when I saw that, and I 19 discussed it with Mike, was I don't 20 like errors in filings that I've made 21 before courts, so I filed an 22 amendment and I did that because I 23 want to be transparent with everyone</p>	<p style="text-align: right;">Page 20</p> <p>1 documents, documents in HealthSouth's 2 own files. This was not a situation 3 where we were playing games in the 4 federal case. We answered the 5 complaint correctly. They knew who 6 to sue. I mean, that is not the way 7 we handle this. 8 So the question becomes how 9 do you deal with it right now, Your 10 Honor. I think the only legitimate 11 way to deal with it is the following: 12 Your Honor, in the decision said if 13 group and investment banks turn out 14 to be legal entities I'll give them 15 the leave to bring a claim against 16 group and investment bank. If Your 17 Honor wants to give plaintiffs leave 18 to sue UBS AG Stamford Branch under 19 this contract Your Honor can do that 20 and then UBS AG Stamford Branch can 21 be served. It's never been served, 22 never been served. UBS Securities or 23 its predecessor UBS Warburg was</p>
<p style="text-align: right;">Page 19</p> <p>1 and there was no attempt by us to 2 trick anyone. 3 THE COURT: And this may be 4 an impertinent question and you may 5 not be able to answer it. Did you 6 discover the error before or after 7 the suit was filed in New York? 8 MR. GIUFFRA: I found out 9 about the error when I read papers 10 filed by HealthSouth in the New York 11 litigation. I did not know about the 12 error and the reason why the error 13 happened, as best I've been able to 14 tell, is you have a 71-page answer 15 and UBS, UBS, UBS is being used 16 throughout the answer and it's being 17 defined at the beginning as UBS 18 Securities. So what happened is one 19 time of the number of times when they 20 used the word UBS where it needs to 21 be done more carefully it wasn't 22 done. But if you look at the answer 23 it also refers to the underlying</p>	<p style="text-align: right;">Page 21</p> <p>1 served because they had a registered 2 agent in the state of Alabama. 3 THE COURT: If I did that, 4 Robert, would I not be opening up 5 Pandora's box with regard to this New 6 York litigation because I had 7 previously ruled some two and a half 8 years ago, I believe, that because of 9 the matters that were intertwined in 10 this lawsuit that the choice of form 11 clause I would not enforce. 12 MR. GIUFFRA: There's an 13 issue that I think sometimes gets 14 glossed over. Those agreements that 15 Your Honor was addressing were 16 agreements between UBS Warburg and 17 then the predecessor which is UBS 18 Securities. UBS AG Stamford Branch 19 was not a party to any of those 20 agreements and this Court 21 respectfully does not have 22 jurisdiction over UBS AG Stamford 23 Branch and it goes back to basic</p>

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<p style="text-align: right;">Page 22</p> <p>1 principles one learns in -- that you 2 cannot -- 3 THE COURT: I guess the 4 question really is whether I do have 5 jurisdiction based upon an act of 6 UBS. I guess that's really the 7 question. 8 MR. GIUFFRA: Your Honor, 9 respectfully when you have two 10 separate legal entities, UBS 11 Securities, LLC and you have UBS AG 12 Stamford Branch, a separate legal 13 entity, I don't see how what was 14 clearly an error in a filing could 15 become the basis for -- 16 THE COURT: I'm not 17 contending there was anything 18 intentional about that, you 19 understand that. 20 MR. GIUFFRA: I understand 21 that, but there's not a basis for 22 saying, oh, suddenly we have 23 jurisdiction over UBS AG Stamford</p>	<p style="text-align: right;">Page 24</p> <p>1 has never been served, that is not 2 before the Court to intervene in a 3 lawsuit. And there are many cases 4 that stand for that proposition. The 5 only way that this Court can litigate 6 and can decide in this case the 7 contract rights of a nonparty is for 8 the Court to give plaintiffs the 9 ability to amend their complaint, 10 bring the claim which they didn't 11 bring in the first instance, serve 12 UBS AG Stamford Branch which doesn't 13 have a registered agent in the state 14 of Alabama and then we would litigate 15 about personal jurisdiction. My own 16 view is I don't think the Court will 17 have personal jurisdiction over UBS 18 AG Stamford Branch because the loan 19 documents reflect that the loan was 20 made, the contract was signed in New 21 York, the money was sent to Georgia, 22 there's no contacts with Alabama. 23 Now, we can disagree about</p>
<p style="text-align: right;">Page 23</p> <p>1 Branch. There's an issue that really 2 does need to be litigated which is 3 whether these plaintiffs can get 4 jurisdiction over UBS AG Stamford 5 Branch because, as I've pointed out 6 before, you read the contracts, they 7 agreed it was made in New York. UBS 8 AG Stamford Branch is in Connecticut, 9 the money flowed to Georgia. 10 THE COURT: Is my order, 11 the estoppel order, broad enough or 12 for UBS AG to intervene in this case 13 and assert the MDCDC loan issue? 14 MR. GIUFFRA: Your Honor, 15 the law is quite clear and we cite a 16 case called Martin versus Wilks which 17 is a U.S. Supreme Court case that a 18 party can have -- that an entity can 19 have notice of some litigation going 20 on but no party has an obligation. 21 And it would violate the 14th 22 amendment. It may well violate 23 Alabama law to require a party that</p>	<p style="text-align: right;">Page 25</p> <p>1 that and I'm sure they would have a 2 different view, but plaintiffs should 3 have to meet their burden. They have 4 an obligation under basic principles 5 of law to serve a party, establish 6 personal jurisdiction over a party 7 and they have essentially tried to 8 have the Court use this -- latch onto 9 this mistake in an answer to suddenly 10 ignore basic principles like personal 11 jurisdiction, subject matter 12 jurisdiction, forcing parties to 13 intervene in cases that they're not a 14 party to and have never been served 15 in. When you start laying it all out 16 it doesn't make sense. 17 Let me make another point 18 which is a useful one. The claim 19 that they have in this case is about 20 the conduct of UBS Securities, the 21 investment banking part of UBS AG, 22 the ultimate parent. The claims they 23 have are about conspiracy, aiding and</p>

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<p style="text-align: right;">Page 26</p> <p>1 abetting a breach of judiciary duty. 2 THE COURT: Who was the 3 parent company of UBS at the time the 4 credit agreement was initially 5 entered? 6 A. UBS AG, the Suisse parent, 7 would have been the ultimate parent 8 of all these entities. 9 THE COURT: That's a 10 different entity from UBS AG Stamford 11 Branch. 12 MR. GIUFFRA: It gets a 13 little complicated, but UBS AG 14 Stamford Branch is a branch of UBS AG 15 and there is some pretty technical 16 banking law issues about what exactly 17 it is as a -- 18 THE COURT: I take your 19 word for that. 20 MR. GIUFFRA: I think I 21 know the answer, but I don't want to 22 say something that could be wrong 23 because one of my banking partners in</p>	<p style="text-align: right;">Page 28</p> <p>1 the judge in New York. Now, the 2 claim that's being litigated here 3 against UBS Securities is a 4 conspiracy aiding and abetting claim. 5 Respectfully, we don't think it's a 6 claim that can survive unless there's 7 summary judgment. We'll bring it. 8 THE COURT: That's a 9 separate issue. 10 MR. GIUFFRA: Separate 11 issue, but the point is certainly 12 plaintiffs in listing their damages 13 that they've suffered because of the 14 alleged malfeasance of UBS Securities 15 can point to the fact that they had 16 to pay this loan back as part of 17 their damages. So it's not as if 18 they don't have a remedy in this 19 court. We have the right to get the 20 money back in the New York action and 21 they can come back and get it right 22 back conceivably in this action. 23 They can at least try to.</p>
<p style="text-align: right;">Page 27</p> <p>1 New York will say, Bob, how could you 2 be saying things in court in Alabama 3 on the record that are just wrong as 4 a matter of law, but there's a lot of 5 law about the question of where a 6 loan is made and whether that 7 subjects the bank to jurisdiction in 8 the place where the loan is even 9 received which in this case would be 10 Georgia. But let me go back to where 11 I was and I think maybe this is a 12 point that might give Your Honor a 13 little bit of comfort about this. 14 There's a contract case 15 between UBS AG Stamford Branch and 16 HealthSouth about the repayment of 17 the money and the view of UBS AG 18 Stamford Branch is that under New 19 York law they've got to pay the 30 20 million dollars back because it's an 21 absolute and unconditional guarantee. 22 They've waived any defenses that they 23 have. That issue would be decided by</p>	<p style="text-align: right;">Page 29</p> <p>1 Now, that's something that 2 comports with law and is consistent 3 with the fact that Your Honor has UBS 4 Securities before the Court. I think 5 what Ms. Cooper mentioned before a 6 deposition involving an employee of 7 UBS Securities and what did or didn't 8 happen with UBS Securities, they can 9 certainly include the 30 million 10 dollars as a claim as part of their 11 damages, they can try to, against 12 Securities and say UBS Securities was 13 involved, but the question that's 14 before the New York court is whether 15 they have an obligation now to pay 16 the money back. And the reason why 17 banks like UBS AG make loans that are 18 guaranteed by third parties is 19 because they have all the legal 20 protections that are in the original 21 loan documents, things like 22 consenting to New York law, 23 consenting to jurisdiction in New</p>

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<p style="text-align: right;">Page 30</p> <p>1 York, having the contract be deemed 2 made in New York and that's 3 ultimately a good thing for everyone 4 concerned because that's why company 5 banks in New York and elsewhere will 6 make loans in Alabama, that's why 7 they will make loans in Georgia 8 because they have those legal 9 protections. That doesn't mean that 10 HealthSouth can't bring its so-called 11 tort claims against UBS Securities. 12 I'm not saying they can't. What I'm 13 saying is if you want to litigate the 14 question of whether or not the loan 15 guarantee should be thrown out and is 16 somehow void, a question of New York 17 law, you've got to bring the party 18 before this Court that's the other 19 party to the contract. You can't say 20 that the party was the investment 21 bank or the investment bank suddenly, 22 which didn't make the loan, is not a 23 party to the contract, its name</p>	<p style="text-align: right;">Page 32</p> <p>1 resolve this issue down here in 2 Alabama in a case that's been pending 3 for five and a half years? 4 MR. GIUFFRA: Very simple 5 reason. The issue before the New 6 York court is a very narrow question 7 of New York law and our position is 8 that regardless of the allegations 9 that HealthSouth makes against UBS, 10 someone knew about the fraud, they 11 cite the research report, all that is 12 irrelevant because the loan guarantee 13 says that you're waiving a claim as 14 to the validity of the guarantee, 15 whether it was induced by fraud and 16 the New York law is pretty clear that 17 you can allege that the bank induced 18 the guarantee by fraud. 19 THE COURT: Is fraud in the 20 inducement a defense in New York? 21 MR. GIUFFRA: No, not a 22 defense in the New York action. They 23 don't have it as a defense and that's</p>
<p style="text-align: right;">Page 31</p> <p>1 doesn't appear on the contracts 2 should enforce it. It would be -- 3 it's inconsistent in fact with what 4 Your Honor contemplated in your order 5 where you said, look, if Giuffra's 6 affidavit about group and investment 7 bank is wrong I'm going to give them 8 leave to sue those entities and serve 9 them. Now, if they want to try to 10 serve UBS AG Stamford Branch, they 11 can try to and we'll litigate about 12 that. My own view is the way this 13 should proceed is we'll litigate the 14 New York action on the question of 15 New York law under the guarantee, 16 we'll win or lose. If we lose the 17 motion for summary judgment I've said 18 and I'll say it on the record again 19 there's no desire to conduct 20 additional discovery. 21 THE COURT: Why would UBS 22 want to incur additional litigation 23 defense in New York when it can</p>	<p style="text-align: right;">Page 33</p> <p>1 why we're coming before Your Honor. 2 Even if Your Honor decided the issue 3 you have to apply the New York law 4 anyway. 5 Your Honor, the New York 6 courts provide for an expedited 7 procedure for addressing these 8 issues. It was contemplated by the 9 parties when they entered into the 10 loan when HealthSouth got the money 11 and all UBS AG Stamford Branch is 12 doing is enforcing its contract which 13 it has a right to do. HealthSouth 14 could before Your Honor claim -- 15 let's suppose Judge Preska gives the 16 30 million dollars back, the New York 17 law says fraud inducement is not a 18 defense and there are many cases in 19 New York that hold that fraud in the 20 inducement is not a defense. 21 HealthSouth has to write a check to 22 UBS AG Stamford Branch. If this case 23 goes forward they certainly can say,</p>

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<p style="text-align: right;">Page 34</p> <p>1 well, we have to pay this 30 million 2 dollars back to UBS AG Stamford 3 Branch and that's one of the things 4 that we think the people from UBS 5 Securities did that was wrong and 6 damaged us. So they can do that, but 7 it's a process that it requires some 8 steps and they want to avoid steps 9 that they had agreed to when they 10 entered into the underlying document. 11 I mean, I think clearly the reason 12 why we're here is they are concerned. 13 I would be if I were sitting in their 14 shoes about the law in New York which 15 is what the contract says provides 16 which is pretty strict about the 17 enforcement of these loan guarantees. 18 But I think what they're asking the 19 Court to do is they latch on to what 20 was a mistake in drafting an answer 21 and saying Your Honor should ignore 22 jurisdiction, subject matter, 23 personal, should ignore service and</p>	<p style="text-align: right;">Page 36</p> <p>1 would become a hook that would be 2 used to try to essentially have the 3 Court rule, no, UBS AG didn't make 4 the loan, it was really made by the 5 investment banking part of UBS and 6 therefore they should enforce the 7 loan issue. I never thought that 8 would happen. The issue didn't come 9 into my thought process. I give the 10 plaintiffs credit for thinking up the 11 strategy that they have here. But 12 the bottom line is I think that we 13 can let the New York case go forward, 14 whatever happens in the New York case 15 will happen, maybe we'll get our 30 16 million, maybe we won't. They can 17 still come and litigate before Your 18 Honor the issue of whether that's 19 part of the damages that HealthSouth 20 suffered, the payment of the 30 21 million dollars. But what I think 22 would be error, respectfully on Your 23 Honor's part, is to just ignore basic</p>
<p style="text-align: right;">Page 35</p> <p>1 you should require the party that 2 didn't make the loan that's not a 3 party to the contract to litigate 4 about this contract issue. 5 THE COURT: If I did not 6 give UBS the relief which it is 7 requesting then your remedy would be 8 mandamus? 9 MR. GIUFFRA: That is 10 correct, Your Honor. Your other 11 alternative would be if you just 12 denied the motion to amend for 13 whatever reason -- although I must 14 admit my only motivation for filing 15 the motion to amend was to correct an 16 error in the record in our answer 17 that was called to my attention by 18 HealthSouth and I discussed it with 19 Mike and I said, what do we do here, 20 he said file the correction. I never 21 in my wildest dreams, but maybe I'm 22 being -- wasn't thinking far enough 23 ahead, thought that that amendment</p>	<p style="text-align: right;">Page 37</p> <p>1 things like what the contract itself 2 says. And there's no question that 3 the contract was UBS AG Stamford 4 Branch. They haven't put forward any 5 evidence that the loan wasn't made by 6 UBS AG Stamford Branch. In fact, 7 their own SEC filings indicate that. 8 They pick a few documents where it 9 has UBS Warburg and they say this 10 proves that the loan was really made 11 by UBS Warburg. The entity that made 12 the loan and actually shipped the 13 money down to Georgia was UBS AG 14 Stamford Branch and whether New York 15 or Alabama, the entity that has the 16 legal right to seek return of that 17 money is the party that was the 18 lender. In addition the 19 administrative agent under the loan 20 agreement has the right to seek the 21 money back. Now, if they want to 22 bring that somehow before Your Honor 23 a claim that was not brought in the</p>

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<p style="text-align: right;">Page 38</p> <p>1 original complaint, the only way -- 2 it's my understanding and I've talked 3 about it with Mike, Alabama law, New 4 York law, Texas law, you pick your 5 place, you've got to have service, 6 you've got to have personal 7 jurisdiction and you've got to have 8 subject matter jurisdiction and what 9 they want to do is ignore all of 10 that. And I think respectfully, Your 11 Honor, that would be error for Your 12 Honor to say, well, you don't have to 13 serve UBS AG, you don't have to fight 14 the battle of personal jurisdiction 15 with respect to UBS AG Stamford 16 Branch, instead we'll just fight the 17 judicial decision that they weren't 18 really the lender, but it's just not 19 true. It's contrary to the evidence. 20 So to sum up, Your Honor, 21 what I think should be done here is 22 that Your Honor should say to them, 23 look, you either can sue UBS AG</p>	<p style="text-align: right;">Page 40</p> <p>1 the first pleading I would get from 2 AG would be that there is a prior 3 pending New York case? 4 MR. GIUFFRA: I think the 5 first pleading you'd get, Your Honor, 6 is there's no jurisdiction. 7 THE COURT: Pardon? 8 MR. GIUFFRA: First of all, 9 they have to serve us and the first 10 filing would be no jurisdiction. 11 That would be the first filing. But 12 I think in terms of -- I think my 13 basic point is the issue of the 14 validity of the loan guarantee has 15 never been brought into this case, 16 it's not in the four corners of the 17 complaint and that's an issue that is 18 properly before the New York court. 19 As I said before, I'm not saying if 20 we get the 30 million dollars back 21 that they can't claim that as part of 22 their damages. They've already 23 identified that as part of their</p>
<p style="text-align: right;">Page 39</p> <p>1 Stamford Branch, serve them and we'll 2 litigate about personal jurisdiction, 3 you can have the case get litigated 4 in New York and then if that's part 5 of the damages that you want to 6 allege in this case based on 7 conspiracy in aiding and betting -- 8 I'm not disputing that that's a claim 9 they could try to bring in this 10 court. Because clearly people who 11 worked at UBS Securities were 12 involved and knew about this loan. 13 But in terms of saying that the 14 guarantee is invalid, which is the 15 claim that's being litigated in New 16 York, that's something where you need 17 to have the party to the contract 18 before the Court. 19 THE COURT: I would presume 20 that if I granted AG the relief that 21 it seeks, in other words, allowing 22 Tucker to sue them in this case, if 23 that occurred, would I be wrong that</p>	<p style="text-align: right;">Page 41</p> <p>1 damages even though they haven't had 2 to pay the money back, but the whole 3 purpose of the New York loan 4 guarantee procedures essentially are 5 if you agree to a loan, if you agree 6 to guarantee a loan you're agreeing 7 to the New York expedited procedures, 8 you're agreeing to the New York law 9 governing loan guarantees and you 10 don't have any defenses to things 11 like validity and regularity with 12 respect to the loan. You can't cite 13 fraud in the inducement as a defense. 14 And the reason for that is New York 15 courts and New York law and the New 16 York legislature and the statutes 17 about this talk about the fact that 18 we want to encourage our banks to 19 make loans in places like Georgia and 20 we want to ensure that they can get 21 prompt repayment on a loan guarantee. 22 So I think the only sensible way to 23 deal with this is to allow the New</p>

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<p style="text-align: right;">Page 42</p> <p>1 York action to go forward. If they 2 want to litigate about this as part 3 of HealthSouth litigation before Your 4 Honor as some sort of a fraud case or 5 aiding and abetting, conspiracy, they 6 can do so, but they certainly -- if 7 they want to litigate about the 8 validity of the loan guarantee you've 9 got to get UBS AG Stamford Branch 10 before the court and you've got to 11 establish personal jurisdiction. 12 THE COURT: Thank you, sir. 13 MS. COOPER: Your Honor, 14 let me just respond to a couple of 15 things here that Mr. Giuffra has said 16 which is actually nothing new. We've 17 heard this all before. These 18 arguments were made in the initial 19 motion and have sharpened somewhat as 20 a result of the situation that 21 Mr. Giuffra now finds himself in 22 which is the appropriate action he 23 would need to take having received</p>	<p style="text-align: right;">Page 44</p> <p>1 Your Honor, because our argument -- 2 HealthSouth's argument in the New 3 York court is twofold. Our threshold 4 argument is New York judge, stay your 5 hand, there is a prior pending 6 Alabama action at which the Med 7 Center Direct loan is at the heart of 8 that. 9 THE COURT: You're saying 10 the New York court could exercise 11 principles of comity and stay the 12 case. 13 MS. COOPER: That's 14 correct, Your Honor. There's a host 15 of principles. And our second 16 argument, Your Honor, to go to a 17 question that you asked to 18 Mr. Giuffra, our second argument is 19 on the merits of the guarantee and 20 our argument, Your Honor, is that the 21 underlying loan and the guarantee 22 were conceived in fraud and were 23 essentially entered into by faithless</p>
<p style="text-align: right;">Page 43</p> <p>1 your initial order on this matter 2 would be to go back into New York 3 court and dismiss that action. That 4 would be the appropriate action for 5 UBS to take at this juncture. Is 6 there any doubt, Your Honor, what UBS 7 will do when they -- in the event 8 that they received an order from this 9 Court backing up from that initial 10 order -- 11 THE COURT: Let's look at 12 it from this prospective. Let's 13 suppose that I don't change my order 14 and let's suppose that AG proceeds 15 forward with the case in New York and 16 suppose the New York court takes that 17 case, keeps that case and doesn't 18 under principles of comity stay that 19 case and then our case goes down to 20 Montgomery and my ruling is upheld. 21 Aren't we facing the possibility of 22 two different outcomes. 23 MS. COOPER: Absolutely,</p>	<p style="text-align: right;">Page 45</p> <p>1 agents of the corporation who had no 2 authority to bind HealthSouth. Your 3 Honor, in order to adjudicate that 4 issue if the New York court were 5 going to take that issue on the 6 merits, they would have to adjudicate 7 the very same issues, Your Honor, 8 that are pending in front of you, for 9 example, on the summary judgment 10 motion. So our first argument is New 11 York court, stay your hand, you have 12 no authority to move forward, you 13 should stay your hand to this prior 14 pending Alabama action, but let there 15 be no confusion about what our 16 argument is on the merits. There is 17 a fraud in the conception defense 18 under New York law. I won't pretend 19 to be a New York lawyer, but I have 20 studied the New York law and in 21 working with very capable New York 22 counsel who represent HealthSouth in 23 this action and those are precisely</p>

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<p style="text-align: right;">Page 46</p> <p>1 the arguments we've made and they are 2 arguments that go to the heart of 3 issues before Your Honor, issues that 4 as you recognized in 2005 and 5 recognized again in this most recent 6 order should not be subverted by a 7 different court going off in another 8 direction. UBS presses in this 9 motion for reconsideration that we 10 have not identified the prejudice to 11 HealthSouth that would result from 12 this. And Your Honor, the prejudice 13 is much more than the fact that we 14 would have to fight a protracted 15 battle with Mr. Giuffra on the 16 personal jurisdiction issues and I'll 17 come back to those. The prejudice is 18 results from the fact that UBS saw a 19 tactical advantage here, saw an 20 opportunity to litigate core issues 21 that are before Your Honor in the New 22 York forum. That is unfair. They 23 should be estopped from taking that</p>	<p style="text-align: right;">Page 48</p> <p>1 THE COURT: Was it in 2005. 2 MS. COOPER: I want to say 3 it was '05 and I'm just looking for 4 the exact date here. 5 THE COURT: Before or after 6 the answer in this case? 7 MS. COOPER: Your Honor, I 8 believe it was before. 9 THE COURT: I don't 10 remember. 11 MR. GIUFFRA: I'll find the 12 date for you, Your Honor. 13 MS. COOPER: Your Honor, if 14 I may address -- so just to summarize 15 quickly, there can be no doubt what's 16 going to happen in the event this 17 Court backed up from its order. UBS 18 is going to run into New York, 19 attempt to use that to its tactical 20 advantage. That's precisely the 21 result. May I, Your Honor, quickly 22 address these so-called 23 jurisdictional issues. Just to be</p>
<p style="text-align: right;">Page 47</p> <p>1 tactical advantage because they told 2 us more than two years ago that UBS 3 Securities, LLC was the proper party 4 on all matters alleged in the Tucker 5 action including the specific 6 allegations with respect to Med 7 Center Direct. They said they made 8 that loan. Why did it take them over 9 two years to correct it, because 10 there was no tactical advantage to 11 correcting it until they saw that 12 road in the New York action and only 13 then did we get news that we were 14 sitting down here fat, dumb and happy 15 in Alabama waiting -- 16 THE COURT: When was -- I 17 may have seen it, but I've forgotten. 18 When was UBS's answer in federal 19 court filed wherein it acknowledged 20 that AG was the lender of the MCDC 21 loan? 22 MS. COOPER: Your Honor, I 23 want to say that was --</p>	<p style="text-align: right;">Page 49</p> <p>1 clear, what we have said to Your 2 Honor in our opposition to UBS's 3 motion to reconsideration is not at 4 all that this Court should direct or 5 order -- 6 THE COURT: Some issue of 7 personal jurisdiction which is a 8 waivable ground. 9 MS. COOPER: Absolutely, 10 Your Honor. There is no question -- 11 the only way there would be a 12 question of subject matter 13 jurisdiction is if Your Honor 14 directed or ordered UBS AG to come 15 into this court and answer, but that, 16 Your Honor, is not what we're saying. 17 What we're saying is that this is a 18 complete tempest entity pot. UBS has 19 the power to solve its own problems 20 and it can do precisely that. Now, 21 if it wants to stand on its current 22 argument that UBS AG was the lender 23 then let UBS AG intervene in this</p>

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<p style="text-align: right;">Page 50</p> <p>1 court which it has the power to do. 2 It will have to waive personal 3 jurisdiction, Your Honor, no question 4 about that, but a party can always do 5 that and is that fair under these 6 circumstances, absolutely it's fair. 7 It's fair because we relied on 8 representations made by UBS's counsel 9 that the lender was in fact UBS 10 Securities, LLC. It is entirely fair 11 that the cost of the personal 12 jurisdiction battle essentially be 13 born by the party who is now saying 14 contrary to a lot of the evidence in 15 the record that it, in fact, was the 16 lender and not simply an 17 administrative agent. So these 18 jurisdictional issues are, as I said, 19 it's a tempest entity pot. Personal 20 jurisdiction can be waived. There is 21 no question of subject matter 22 jurisdiction, Your Honor, and we ask 23 you in fairness and equity not to</p>	<p style="text-align: right;">Page 52</p> <p>1 and that is we are in coordination 2 with federal court and with the court 3 up in Delaware so that you understand 4 there have been serious consequences 5 to me and to Wade Tucker as a result 6 of the coordination of efforts. 7 HealthSouth has suffered in excess of 8 two billion dollars in damages as a 9 result of the breach of fiduciary 10 duties by its officers and directors. 11 That's a lot of money. The 12 shareholders have suffered billions 13 of dollars in losses, the bond 14 holders have billions of dollars 15 involved and yet all of us are having 16 to work together in order to 17 coordinate discovery. There are 18 severe time restrictions on 19 depositions. All of these parties 20 with billion dollar claims are having 21 to allocate specific time. Why do we 22 do that, because all the parties and 23 the courts feel that we needed to</p>
<p style="text-align: right;">Page 51</p> <p>1 back up from an order that was 2 entirely appropriate on the facts and 3 the law. 4 THE COURT: Y'all have 5 suggested that an amendment be made 6 to the order which would provide for 7 UBS AG to intervene. Is that really 8 necessary? 9 MS. COOPER: Your Honor, we 10 don't think it's necessary. To the 11 extent, Your Honor, we're concerned 12 that the language of your order is 13 not broad enough to permit that 14 result or if UBS were to take that 15 position we would say there is an 16 easy cure for it but I don't think 17 it's necessary. I think it's clear 18 based on the language of your order 19 that UBS can take that or other 20 action to, as I said, solve its own 21 problem. 22 MR. HALEY: Judge, I'd like 23 to just get back to how this started</p>	<p style="text-align: right;">Page 53</p> <p>1 work together to handle this 2 litigation in an efficient manner and 3 that is what we have done. The 4 federal claims over in federal court 5 and all of the state law claims are 6 right here in front of Your Honor and 7 now then UBS doesn't want to 8 participate in that because they see 9 tactical advantages by going to New 10 York. That's just not fair and it's 11 not right, Your Honor, and you got it 12 right the first time. So that when 13 you look at this what they've done 14 and as Your Honor knows what happened 15 up in Delaware has had consequences, 16 what Judge Strine wrote in his 17 orders. What has happened in this 18 court and in the supreme court has 19 had effects on the litigation. And 20 what we do up in New York, what 21 happens on this, there would be 22 consequences that are going to be 23 effected right here in Birmingham,</p>

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<p style="text-align: right;">Page 54</p> <p>1 Alabama if the case goes forward up 2 in New York. There's just going to 3 be orders entered that will have 4 affect on what we do. So there's 5 been a great effort now going into 6 the sixth year to coordinate 7 everything and there is absolutely no 8 reason that this particular claim 9 cannot be litigated right here in 10 Birmingham, Alabama.</p> <p>11 MR. GIUFFRA: Your Honor, 12 the HealthSouth fraud caused damage 13 to a lot of people, but the question 14 of who should pay for that damage is 15 something that needs to be decided by 16 facts and law, not who's got a deep 17 pocket. Now, one issue that I think 18 needs to be dealt with right up 19 front, we keep talking about not 20 knowing who the lender was. We've 21 heard not one word from anyone who 22 stood up on the other side that the 23 amendments were not in the files of</p>	<p style="text-align: right;">Page 56</p> <p>1 that this loan was made to UBS AG 2 Stamford Branch. No secret, no 3 secret at all and I don't see how 4 that a party that's got the contract 5 in its files that's filed SEC filings 6 where they've identified the lender 7 as UBS AG Stamford Branch can now 8 come in here and say we read a line 9 in an answer and we were confused. 10 It doesn't make any sense.</p> <p>11 MS. COOPER: Your Honor, 12 HealthSouth 2004 --</p> <p>13 MR. GIUFFRA: Julia, it's 14 my motion. Let me finish.</p> <p>15 THE COURT: Let him finish.</p> <p>16 MR. GIUFFRA: You'll get 17 your rebuttal. But they can't ignore 18 the fact that their own SEC filings 19 identified this loan as being made by 20 UBS AG Stamford Branch. They don't 21 dispute that the amendments were in 22 their files, they don't dispute it. 23 They don't dispute that in the</p>
<p style="text-align: right;">Page 55</p> <p>1 HealthSouth and that HealthSouth was 2 not aware of those amendments. In 3 fact, Your Honor, we put before the 4 Court forms 8K filed by HealthSouth 5 and these were filed -- there's three 6 of them. One is March 22nd, 2005, 7 the second was June 15, 2005 and the 8 third was March 16, 2006. Those 9 documents were Exhibits F, G and H to 10 UBS's opposition to the motion to 11 strike and those were documents that 12 were filed under penalty of potential 13 subject to violations of the 14 securities laws if they were inactive 15 and the folks over at HealthSouth, 16 general counsel's office, whoever 17 their outside securities counsel were 18 who obviously were involved in 19 dealing with the various issues 20 surrounding the HealthSouth fraud, 21 they in those documents, Exhibits F, 22 G and H, March the 22nd, 2005, June 23 15, 2005 and March 16, 2006, all said</p>	<p style="text-align: right;">Page 57</p> <p>1 federal case the plaintiffs identify 2 UBS AG as the lender. They don't 3 dispute that in the federal action we 4 properly answered the complaint, we 5 filed interrogatories for the federal 6 complaint that didn't have this 7 error. I can see they'd have a 8 better argument if their own SEC 9 filing said one thing and if it were 10 consistent.</p> <p>11 THE COURT: I have read 12 somewhere that the original credit 13 agreement being dated March the 30th, 14 2001 that the 15 million dollars 15 exchanged hands on that day. I've 16 read that somewhere in some of 17 y'all's papers. Do you know whether 18 that's accurate or not?</p> <p>19 MR. GIUFFRA: I don't know 20 the answer to that, Your Honor. I do 21 know that ultimately there was 20 22 million dollars paid. The way it 23 works under one of these credit</p>

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<p style="text-align: right;">Page 58</p> <p>1 agreements -- and I'm actually 2 looking into this issue -- you have a 3 line of credit up to 20 million 4 dollars and then you can draw down on 5 it and we've already been finding 6 documents dealing with the fact that 7 there are requests being made from 8 Med Center to send money down and it 9 was not done in a 15 million dollar 10 increment, it was done in smaller 11 increments and those documents make 12 it clear that the loan was being made 13 by UBS AG Stamford Branch. So they 14 keep talking about being misled. 15 Well, I don't see how you can be -- 16 you talk about estoppel and waiver 17 when your own SEC filings make it 18 clear in the middle of when this is 19 all happening with respect to this 20 answer that UBS AG Stamford Branch 21 made the loan. I don't see how you 22 can say you were somehow misled by an 23 answer in a case which is the only</p>	<p style="text-align: right;">Page 60</p> <p>1 lawyers at HealthSouth -- and there 2 was no affidavit being submitted to 3 Your Honor from the general counsel 4 or the folks who actually look at 5 these documents saying I was misled 6 because if they were misled, why 7 would they be filing things with the 8 SEC in 2005 and 2006 saying UBS AG 9 Stamford Branch. These are smart 10 people. They can look at a contract 11 which is in their files and see who 12 the lender is. So that's my first 13 point. My second point is with 14 respect to the New York action which 15 Julia talked about, the law is the 16 following: There's a doctrine called 17 Colorado River Abstention and that's 18 when a federal court abstains in 19 favor of a state court proceeding. 20 The circumstances for that don't 21 apply, we believe. Different 22 parties -- 23 THE COURT: Why is that?</p>
<p style="text-align: right;">Page 59</p> <p>1 place where we made this mistake. 2 THE COURT: I don't think 3 they're contending that I was 4 mislead. I think what they're 5 telling me is that if they had known 6 that AG made the loan AG would have 7 been a party to this lawsuit over two 8 years ago. 9 MS. COOPER: That's 10 correct, Your Honor. 11 MR. GIUFFRA: But, Your 12 Honor, they knew. It's in their SEC 13 filings, HealthSouth's SEC filings. 14 THE COURT: Aren't you 15 begging the question, though, Robert, 16 they knew but you represented that 17 what they knew was not correct. 18 MR. GIUFFRA: We made one 19 drafting error. In all the filings 20 we made in this entire case we made 21 one drafting error and so what I'm 22 saying is nobody was misled about 23 anything. I think that the corporate</p>	<p style="text-align: right;">Page 61</p> <p>1 MR. GIUFFRA: Because 2 different parties -- UBS AG Stamford 3 Branch is not a party to this case 4 and in fact their second circuit law 5 which is the federal appeals court 6 for the southern district of New York 7 where this case is pending and 8 there's a case called Sagrbonnet, 9 S-A-G-R-B-O-N-N-E-T, which we think 10 applies. So irrespective of Your 11 Honor's -- whatever happens in 12 Alabama, we don't think that a New 13 York court should abstain. In fact, 14 the case that was brought in New York 15 was originally brought in state court 16 in New York and the state court in 17 New York would not abstain in favor 18 of a state court action in Alabama. 19 So they removed the case in federal 20 court and the law is pretty strong 21 that federal court has to exercise 22 its jurisdiction. So I think the 23 federal court will move forward and</p>

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<p style="text-align: right;">Page 62</p> <p>1 we'll litigate about that issue, too. 2 But the bottom line, Your 3 Honor, is that they say, for example, 4 this question of conceived and fraud 5 and faithless agents. What they 6 don't say when they make that 7 assertion is that this guarantee was 8 approved by the board of directors of 9 HealthSouth. It wasn't like one of 10 the guys in HealthSouth was off 11 signing documents. It was approved 12 by the board of directors. That's 13 another issue that is being dealt 14 with and that's part of their defense 15 in the New York action. 16 THE COURT: But wouldn't 17 HealthSouth say that the board of 18 directors was misled by the pleading 19 defendants in this case and was 20 responsible for originating the loan. 21 MR. GIUFFRA: They can say 22 that, Your Honor, but the problem is 23 that when you enter into one of these</p>	<p style="text-align: right;">Page 64</p> <p>1 plaintiff in New York didn't respond 2 to was when I said, look, if they're 3 ordered to pay the 30 million dollars 4 back to UBS and it's sitting in UBS's 5 bank account they can still litigate 6 as part of their claimed damages this 7 Med Center loan. No one is saying 8 they can't as part of this case. The 9 question is whether they have an 10 obligation to do what they agreed to 11 which was to pay the guarantee back 12 unconditionally and absolutely. 13 Another point, Your Honor, 14 they say that this loan guarantee is 15 a core issue in the case before Your 16 Honor. The words loan guarantee do 17 not appear in the complaint filed by 18 plaintiffs. It just doesn't appear. 19 So to say it's a core issue is 20 just -- if it was a core issue I 21 think these smart lawyers would have 22 it somewhere in their multipage 23 complaint. At the end of the day it</p>
<p style="text-align: right;">Page 63</p> <p>1 absolute and unconditional loan 2 guarantees, New York law is pretty 3 clear that if there's fraud in the 4 inducement of a loan guarantee you 5 still have to pay on the loan 6 guarantee. 7 THE COURT: Which if that's 8 true then you would still be able to 9 have that asserted down here, would 10 you not? 11 MR. GIUFFRA: But, Your 12 Honor, the difference is that the 13 party that has the right to assert 14 that claim is not before Your Honor 15 and that's the party who had the 16 right to pick the New York forum and 17 that's where the case was litigated. 18 And the reason it was litigated there 19 was because New York provides for an 20 expedited procedure and they 21 consented to jurisdiction in New 22 York. And the other point that both 23 plaintiffs, HealthSouth and the</p>	<p style="text-align: right;">Page 65</p> <p>1 goes back to first principles, you 2 have a contract, there are two 3 parties to the contract, the two 4 parties to the contract can litigate 5 about the contract, you can't have a 6 third party litigate about a contract 7 that's the contract of another party. 8 Alabama is quite clear in an Alabama 9 Supreme Court case which we cite that 10 a subsidiary cannot enforce its 11 parent contracts. And Alabama law is 12 also quite clear that in order to 13 have jurisdiction over a party you've 14 got to serve the party and you've got 15 to litigate about personal 16 jurisdiction. And so, we think under 17 basic first principles of law that 18 Your Honor's order as presently 19 drafted was premised on two errors. 20 First, as to whether AG was in fact 21 the lender. We think we've addressed 22 that by providing you with the 23 amendments, and in the stack of</p>

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<p style="text-align: right;">Page 66</p> <p>1 papers you got I could see there was 2 a lot of paper in there. They can't 3 ignore their own SEC filings on that 4 point. 5 THE COURT: Well, the June 6 2001 addendum and the March 2002 7 addendum were in the original 8 documents that you provided. The 9 only thing not in there was the 10 affidavits that Mr. -- 11 MR. GIUFFRA: Kahal, 12 K-A-H-A-L. So on the first point is, 13 Your Honor, the decision was premised 14 on some -- not who was the lender. I 15 think we've addressed that. The 16 second piece of Your Honor's order is 17 whether Your Honor has the right to 18 enter orders requiring the party 19 before the court to litigate the 20 substantive contract rights of a 21 party that's not before the Court 22 that hasn't been served by which the 23 Court doesn't have personal</p>	<p style="text-align: right;">Page 68</p> <p>1 is our highest court. And in that 2 case you had a situation where the 3 loan guarantor had put in evidence 4 that the court said it was sufficient 5 to defeat summary judgment and the 6 court -- the New York court of 7 appeals said not withstanding that 8 evidence of fraudulent inducement 9 we're still going to enforce the loan 10 guarantee because it was an absolute 11 and unconditional loan guarantee. 12 That's a pure question of New York 13 law. So, Your Honor, I think the 14 clear way to proceed here is either 15 let them try to bring UBS AG in as a 16 party or everyone should just let the 17 New York court decide what the issue 18 is. They can still litigate the 19 question of damages before Your Honor 20 under conspiracy or aiding and 21 abetting claim, they can try to, but 22 I think to have the court do this 23 very strange procedural two step</p>
<p style="text-align: right;">Page 67</p> <p>1 jurisdiction and we think the Court 2 can't do that. And again, they 3 haven't disputed what I said before 4 which is that in terms of the equity 5 and fairness point the money gets 6 paid back in the New York action if 7 the New York law is as strict as I 8 believe it is and we'll disagree 9 about that. They can still assert 10 that as part of their damages in this 11 court to get the money back. And if 12 I'm wrong about the New York law and 13 their New York lawyer is right, well 14 then the case will just sit because 15 we're not going to, as I've said 16 before, start a whole separate set of 17 discovery in the New York case. All 18 we want to have the New York court do 19 is decide the pure question of New 20 York law which is whether fraudulent 21 inducement is a defense to an 22 absolute unconditional loan guarantee 23 decided by our court of appeals which</p>	<p style="text-align: right;">Page 69</p> <p>1 which is essentially say this little 2 thing in an answer suddenly creates a 3 way around personal jurisdiction and 4 subject matter jurisdiction would be 5 error and personal jurisdiction and 6 subject matter jurisdiction are tied 7 together. With no personal 8 jurisdiction the Court has no subject 9 matter. The Court has no subject 10 matter jurisdiction to rule with 11 respect to the contract rights of a 12 nonparty. 13 THE COURT: Julia. 14 MS. COOPER: Very, very 15 briefly, Your Honor. I do want to 16 address Mr. Giuffra's argument that 17 somehow HealthSouth sat on its hands 18 or knew things and didn't act 19 appropriately. Attached as Exhibit 1 20 to the our opposition to the motion 21 for reconsideration is an excerpt 22 from the 2004 form 10K and also the 23 2005 10K. In each of those</p>

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<p style="text-align: right;">Page 70</p> <p>1 HealthSouth stated HealthSouth 2 provided a guarantee for 20 million 3 of Med Center Direct's debt to UBS 4 Warburg. We were clearly under a 5 very serious misimpression about who 6 the lender is if in fact 7 Mr. Giuffra's arguments today are 8 correct. We relied on UBS's 9 statements to the Court, Your Honor. 10 It would be unfair to prejudice us by 11 backing up from that. Your Honor, 12 this is truly a 30 million dollar 13 tail attempting to wag a two billion 14 dollar dog. And it may have been an 15 itty bitty mistake that Mr. Giuffra 16 and his co-counsel made in making 17 that statement to the Court, but 18 there is no question that it is a 19 mistake which if corrected in the way 20 that Mr. Giuffra would like to 21 correct it today would give UBS a 22 tremendous tactical advantage in this 23 litigation. And Your Honor, they</p>	<p style="text-align: right;">Page 72</p> <p>1 they cite that's at all like this and 2 Julia, again, did not -- 3 THE COURT: There's a lot 4 in this case that's not like a lot of 5 other litigation that's ever appeared 6 in the court. 7 MR. GIUFFRA: But they 8 didn't dispute what I said which is 9 that they have a remedy. They can 10 get the 30 million dollars back, they 11 can put it on their list of 30 12 million dollars that they're entitled 13 to in the claims against UBS 14 Securities. And so, I think that you 15 should follow the law as opposed to 16 this procedure that is something I've 17 never heard of in any court 18 proceeding where you can effect the 19 substantive contract writing of a 20 nonparty without ever serving them. 21 THE COURT: John. 22 MR. HALEY: The only thing 23 Mr. Giuffra is saying is he wants to</p>
<p style="text-align: right;">Page 71</p> <p>1 should not be permitted to do it. 2 We've moved under rule 15A, Your 3 Honor has the power under 15A to -- 4 the Alabama courts have consistently 5 ruled that, quote, the grant or 6 denial of a leave to amend under rule 7 15A is within the sound discretion of 8 the trial judge and subject to 9 reversal on appeal only for abuse of 10 discretion. They can take that 11 mandamus but that's not a basis for 12 seeking a mandamus in the Alabama 13 courtroom. 14 MR. GIUFFRA: One quick 15 point. The issue of subject matter 16 jurisdiction and personal 17 jurisdiction is not abuse of 18 discretion, it's whether you can do 19 what they want you to do and we don't 20 believe you can do what they're 21 asking you to do. And if you look at 22 the cases on striking amendment to 23 answers there is not one case that</p>	<p style="text-align: right;">Page 73</p> <p>1 go before we do. I've been begging 2 for however long I've been in this 3 case to get it set for trial, go 4 forward, let me do discovery. We 5 didn't get any discovery until during 6 the fall after millions of dollars in 7 production of documents and then the 8 depositions started in I believe this 9 year, 2008. So we've been in this 10 lawsuit six years. Wade Tucker has 11 been fighting to get discovery and to 12 get his case so that he can get money 13 on behalf of the corporation and it's 14 just not fair for UBS to say they can 15 take an end run around everything 16 that's taken place and they can get 17 theirs before we get ours. That's 18 just not fair. 19 THE COURT: I appreciate 20 your arguments here this afternoon. 21 I believe you have some papers for me 22 tomorrow. 23 MR. GIUFFRA: Yes, Your</p>

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<p style="text-align: right;">Page 74</p> <p>1 Honor.</p> <p>2 THE COURT: Since we had</p> <p>3 our summary judgment argument I have</p> <p>4 obtained the briefs, Judge King's</p> <p>5 ruling, the Court of Appeals' ruling</p> <p>6 and the two opinions of the Alabama</p> <p>7 Supreme Court, the first of which was</p> <p>8 withdrawn and the second of which</p> <p>9 became the definitive. I am advised</p> <p>10 that the Alabama Supreme Court did</p> <p>11 not entertain oral argument in the</p> <p>12 tax refund case. I'm curious as to</p> <p>13 why the first Alabama Supreme Court</p> <p>14 opinion did not address the unclean</p> <p>15 hands issue whereas the second</p> <p>16 opinion did so. Does any one of</p> <p>17 y'all have any incite into that?</p> <p>18 MR. GIUFFRA: The only</p> <p>19 incite I can draw, Your Honor, is</p> <p>20 they obviously thought it was an</p> <p>21 important issue that needed to be</p> <p>22 included in the opinion because the</p> <p>23 unclean hands doctrine is something</p>	<p style="text-align: right;">Page 76</p> <p>1 MS. COOPER: It's actually</p> <p>2 not pure speculation.</p> <p>3 THE COURT: I understand.</p> <p>4 All right. I enjoyed your arguments</p> <p>5 this afternoon. I look forward to</p> <p>6 getting your papers tomorrow, then</p> <p>7 I'll enter appropriate order in</p> <p>8 regard to the matter that we've had</p> <p>9 this afternoon.</p> <p>10</p> <p>11 (Whereupon, the hearing</p> <p>12 was concluded at 3:00 p.m.)</p> <p>13</p> <p>14</p> <p>15</p> <p>16</p> <p>17</p> <p>18</p> <p>19</p> <p>20</p> <p>21</p> <p>22</p> <p>23</p>
<p style="text-align: right;">Page 75</p> <p>1 that applies in the context of this</p> <p>2 HealthSouth fraud.</p> <p>3 THE COURT: Julia.</p> <p>4 MS. COOPER: Your Honor,</p> <p>5 it's my understanding that an</p> <p>6 argument the State pressed the second</p> <p>7 time around that they did not press</p> <p>8 the first time around is that the</p> <p>9 Court need not be concerned that</p> <p>10 HealthSouth was sort of stuck if the</p> <p>11 Court ruled against it because, in</p> <p>12 fact, HealthSouth through derivative</p> <p>13 counsel or directly had a remedy in</p> <p>14 precisely this type of litigation.</p> <p>15 And Your Honor, that's my</p> <p>16 understanding of why it was addressed</p> <p>17 the second time around, but all I can</p> <p>18 say is I am inferring that.</p> <p>19 THE COURT: The truth of</p> <p>20 the matter is no one knows.</p> <p>21 MR. GIUFFRA: Your Honor, I</p> <p>22 think you can't -- this is just pure</p> <p>23 speculation.</p>	<p style="text-align: right;">Page 77</p> <p>1 C E R T I F I C A T E</p> <p>2</p> <p>3 STATE OF ALABAMA</p> <p>4 COUNTY OF JEFFERSON</p> <p>5</p> <p>6 I, Christie L. Williams,</p> <p>7 hereby certify that the above and</p> <p>8 foregoing proceeding was taken down</p> <p>9 by me on Computerized Stenotype, and</p> <p>10 the questions and answers thereto</p> <p>11 were transcribed by me, and that the</p> <p>12 foregoing represents a true and</p> <p>13 correct transcript of the proceeding</p> <p>14 given by said counsel upon said</p> <p>15 hearing.</p> <p>16 I further certify that I am</p> <p>17 neither of counsel nor of kin to the</p> <p>18 parties in the action, nor am I in</p> <p>19 anywise interested in the result of</p> <p>20 said cause.</p> <p>21</p> <p>22 CHRISTIE L. WILLIAMS</p> <p>23 COMMISSIONER (ACCR# 372)</p>

20 (Pages 74 to 77)